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No. 140.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

JEWELL-LaSALLE REALTY COMPANY, A CORPORATION,

VS.

GENE BUCK, AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, AND LEO FEIST, INC., A CORPORATION.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR JEWELL-LaSALLE REALTY COMPANY (DEFENDANT BELOW) ON QUESTIONS II, III AND IV.

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DISTRICT COURT OPINION.

The opinion of the District Court in this case which is now pending in the United States Circuit Court of Appeals for the Eighth Circuit, and out of which the questions certified herein arise, is officially reported in 32 Fed. (2d) 366 under title of *Buck* v. *Duncan*. The portion of the opinion covering questions II, III and IV in the certificate is found at loc. cit. 368.

JURISDICTIONAL GROUNDS.

This court has jurisdiction by virtue of the Certificates of the United States Circuit Court of Appeals for the Eighth Circuit under 28 U. S. Code, Section 346, the questions arising in a case now pending before it and on which it desires the instruction of this court.

STATEMENT OF FACTS.

This case is before the court on certificate from the Eighth Circuit Court of Appeals. Questions II, III and IV in the certificate (R. 9) relate to the matters in the cross appeal of defendant Jewell-LaSalle Realty Company (hereinafter called the Company) from the judgment of the United States District Court for the Western Division of the Western District of Missouri (32 Fed. (2d) 366), and concern the question of the statutory measure of damages (17 U. S. Code, Sec. 25) for infringement of copyright in a non-dramatic musical composition by unauthorized public performance. The parties have agreed to file separate briefs on question I (which relates solely to plaintiffs' appeals in both cases) and on questions II, III and IV (which relate only to defendant's appeal in one of the cases). In this brief we will consider only the last three questions in the certificate.

The Company, by means of an orchestra, caused the performance of a copyrighted musical composition in its hotel—the rights under which were owned by

plaintiffs—without the consent of plaintiffs. There was no proof of actual damages (R. 8). The District Court, on the count charging this infringement, awarded plaintiffs $100 attorneys' fees and $250 damages, and enjoined defendant from further infringing plaintiffs' rights (32 Fed. (2d) 368). The Company filed its cross appeal to the Circuit Court of Appeals complaining that $250 was not the proper statutory measure of damages for the type of infringement involved herein where no actual damage was shown. The Circuit Court of Appeals has certified to this court the following questions:

> Question II. In a case disclosing infringement of a copyright covering a musical composition, there being no proof of actual damages, is the court bound by the minimum amount of $250 set out in the so-called "no other case" clause of Section 25 (b) of the Copyright Act (17 U. S. C. Sec. 25), reading, "and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty"?
>
> Question III. Is Section 25 (b) Fourth of the Copyright Act (17 U. S. C. Sec. 25) applicable, in the discretion of the court, to a case disclosing infringement of copyright covering a musical composition, there being no proof of actual damage?
>
> Question IV. In Section 25 (b) of the Copyright Act (17 U. S. C. Sec. 25) is the clause reading, "nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant," confined in its scope to the particular cases of infringement theretofore specifically mentioned in said Section 25 (b)?

PRELIMINARY STATEMENT.

Considerable confusion will be eliminated if at the outset, in searching the statute for a measure of damages to be applied to the case at bar, the character of the infringement admitted is particularly noted. Though the questions certified refer only to "infringement of a copyright covering a musical composition" (Ques. II, R. 9) without specifying the character of the infringement, the questions can only be answered in light of the statement of facts in the certificate, showing the infringment in question to be by *public performance for profit.* A "copyright covering a musical composition" may be infringed in various ways: by printing, reprinting, publishing, copying, vending (17 U. S. C. Sec. 1 (a)); by arranging or adapting (Sec. 1 (b)); by performing publicly for profit (Sec. 1 (d)); and so on. The term "damages" necessarily imports the idea of compensation; and the measure of damages for performing would not have any relation to the measure of damages for copying, as the wrongful act, or trespass, being of a different nature, the resulting injury would differ. It would therefore be logical to expect different measures of damages in the statute for different types of infringement. It follows that in some types of infringement of a musical composition copyright the court may be bound by the limitations of the "no other case" clause, whereas in other types of infringement is might not be. The questions, read in light

of the statement of facts, relate to infringement by performance. The question whether, in such a case, where no damage is shown, the court is bound to award $250 damages, has never been passed on by this court.

SUMMARY OF ARGUMENT.

Section 25 of the Copyright Statute is expressly recognized by the courts to be ambiguous and inartificially drawn, and to be burdensome and unreasonable when the limitations in the "no other case" clause are applied to cases of infringement of a musical composition copyright by public performance.

It is clear that the lower courts have unwillingly adopted such an unjust construction only because of the (we say, mistaken) conclusion that this court's decision in *Westermann Co.* v. *Dispatch Co.*, 249 U. S. 100, involving infringement of a copyright in an illustration by publication is controlling in cases of infringement of musical composition copyrights by public performance.

The Westermann case is not an authority for the proposition for which it has been cited, and does not, as has been generally supposed, require the court to assess $250 as a minimum in a case of infringement by public performance of a copyrighted musical composition.

Reference to previous Copyright Statutes and to the Congressional Committee reports is convincing that the legislature did not intend that subparagraph "fourth" relating to infringing performances should be limited by the "no other case" clause.

The Westermann case cannot be applied to infringement of a musical composition copyright by public performance because if so applied the statute becomes inconsistent with itself.

BRIEF OF ARGUMENT.

1.

Section 25 of the Copyright Statute is expressly recognized by the courts to be ambiguous and inartificially drawn, and to be burdensome and unreasonable when applied to cases of infringement of a musical composition copyright by public performance.

By questions II, III and IV in the Certificate, the Circuit Court of Appeals seeks the ruling of this court as to what measure of damages Section 25 of the Copyright Act (17 U. S. C. Sec. 25) provides "in lieu of actual damages" for an "infringing performance" of a non-dramatic musical composition. The statute is as follows:

> "Sec. 25. (*Infringements.*) That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:
>
> "(a) To an injunction restraining such infringement;
>
> "(b) To pay the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photo-

graph such damages shall not exceed the sum of two hundred dollars, nor be less than the sum of fifty dollars, and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of one hundred dollars; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of five thousand dollars nor be less than two hundred and fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

"First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

"Second. In the case of any work enumerated in section five of this act, except a painting, statute or sculpture, one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

"Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery;

"Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance."

As to the type of infringement in question (public performance for profit) it must be conceded that the statute is ambiguous. It sets stipulated amounts for certain types of infringement (paragraphs "first" to "fourth"); yet in paragraph (b) the statute provides that for a newspaper reproduction of a copyrighted photograph the damages must be between $50 and $200, etc., and "in no *other* case" shall the damages range outside of a stipulated minimum or maximum. Does the word "other" refer to infringement by newspaper reproduction or motion picture production? Or does it refer to the four sub-paragraphs? Or does it refer to all types of infringement for which the statute does not stipulate a measure of damages, the phrase being intended as a catch-all to make sure no infringer will escape liability because an express measure of damages is not provided.

"I confess that, on the first reading of this statute I was firmly of the opinion that $10.00, being the sum specifically mentioned in clause 'fourth' of the section cited as recoverable for such infringement, should be the amount allowed as liquidated damages, in the absence of proof of actual damage." Bledsoe, D. J., in *Waterson, Berlin & Snyder* v. *Tollefson*, 253 Fed. 859.

"From a casual reading of this section, it would seem that the case of a musical composition being specifically provided for in the fourth paragraph, the case would be governed by that paragraph, which provides $10.00 for each performance, and that resort could not be had to the general clause in subdivision (b) providing $250.00 as the minimum, and at first I was very firmly of opinion that this was the proper construction." Cochrane, D. J., in *Whitmark & Sons v. Pastime Amusement Co.*, 298 Fed. 470.

"It was urged in that case, as in this that the fourth paragraph of the act providing the penalty applied and that $10.00 rather than $250.00 should in discretion of the court be fixed as the amount of recovery, and Judge Cochrane in that case thought, as I thought in this case when the statute was first read, that this was the correct interpretation." Groner, D. J., in *Buck* v. *Jarvis*, E. D. Va., decided March 23, 1927.

"I agree with the conclusion of the majority in all respects except as to the measure of damages to be awarded for infringement by us of a phonograph record for a public performance for profit. The question is not free from doubt, as the statute, with relation to the measure of damages, is decidedly ambiguous." Foster, C. J., dissenting in *Irving Berlin, Inc.* v. *Daigle*, (5th C. C. A.) 31 Fed. (2d) 832.

"* * * a statute which has been somewhat aptly described as 'inartificially drawn.'" *Dreamland Ballroom* v. *Shapiro, Bernstein & Co.*, (7th C. C. A.) 36 Fed. (2d) 354, l. c. 355.

To interpret the statute as it has been interpreted by the Honorable District Court effects results that are unconscionable and shocking to the sense of justice. The damages provided in these sections are "in lieu of actual damages" and are to be "such damages

as to the court shall appear to be just," and "shall not be regarded as a penalty." Under the interpretation of the statute now prevailing in the lower courts, a small town theatre owner has been compelled to pay perhaps his month's earnings because his hired boy pumping the player piano played on one occasion only a roll he had borrowed without the knowledge or consent of the proprietor (22 Fed. (2nd) 412). A cafe owner in a small town who also operated a music store in conjunction with the cafe, has been compelled to pay over three hundred and fifty dollars as damages, attorneys' fees and costs for playing a phonograph record while a few people were patronizing his restaurant (*Buck* v. *Myers*, W. D. Mo., not officially reported). The proprietor of a dance pavilion has been held liable for $750.00, costs and attorneys' fees because the orchestra he hired played three copyrighted selections —probably one-tenth of the music furnished for the evening—an amount surely far in excess of the gross proceeds of the dance (31 Fed. (2d) 832). A single Victrola performance in a cafe (24 Fed. (2d) 876), a single player piano rendition in a theater (24 Fed. (2d) 877), the playing of a single phrase of one chorus by "ear" by a theater organist (298 Fed. 470), have all been held to require the payment of $250.00, costs and attorneys' fees. If the statute must be so interpreted, then Congress, by legislative enactment, has required the courts to extract unconscionable penalties in favor of private parties, and then satirically to inform the defendant that he is not being punished—"shall not be regarded as a penalty."

The language of Judge Sanborn in *No. Pac. Ry. Co.* v. *U. S.* (8th C. C. A.) 213 Fed. 162, l. c. 167 in a case involving the construction of another statute, could well apply to the case at bar;

> "Such an interpretation of this Act of Congress renders it so unjust and oppressive that we cannot think that Congress intended that it should receive such a construction."

To similar effect is the language of this court in the appeal of the same case (*U. S.* v. *No. Pac. Ry. Co.*, 242 U. S. 190, l. c. 194):

> "We cannot bring ourselves to think that Congress intended to punish such an innocent mistake or omission with a penalty of $100 a day."

The judges assessing these so-called "damages" have realized their severity.

> "The plaintiff may, of course, take the usual injunction, though under the circumstances it will apparently be of no service. As for damages, it seems to be absurd to suggest that it has suffered any injury. 'Dardanella' had faded out before 'Kalua' appeared; but if it had been at the peak of its popularity, I do not believe that the accompaniment to the chorus of 'Kalua' would have subtracted one copy or one record from its sales. * * * I must and do award that sum ($250.00) as damages. The plaintiff is likewise absolutely entitled to a full bill of costs, but I will make no allowance for counsel fees, since that is discretionary. Such victories I may properly enough make a luxury to the winner" (Learned Hand, D. J., in *Fisher* v. *Dillingham*, 298 Fed. 145).
>
> "* * * The court feels that the statutory damage of $250.00 for each infringement is rather large" (Hicks, D. J., in *Cravens* v. *The Association*, 26 Fed. (2) 833).

"To adopt the rule that a minimum award of $250.00 must be granted in each case of infringement by use of a phonograph record in a moving picture show, or a small cheap restaurant, or a bootblack stand, in all of which they are frequently used, causes the resulting damages to be so excessive as to be unconscionable, an intention I cannot attribute to Congress" (Foster, C. J., dissenting in *Irving Berlin, Inc.* v. *Daigle,* 31 Fed. (2d) 832).

"* * * Without regard to my own views as to its hardship, I am obliged to enter decree * * * for $250.00 for playing of the selection in a dance hall" (*Buck* v. *Jarvis,* D. C. E. D. Va., Groner, D. J., opinion filed March 23, 1927).

"Appellants' argument in support of their position respecting the amount of damages, too, has much appeal." *Dreamland Ballroom* v. *Shapiro, Bernstein & Co., supra.*

It is not necessary unduly to lengthen this brief by similar quotations. The fact is clear that the statute is ambiguous and that the courts are awarding $250.00 minimum against their own expressed views as to the justice of such an award.

2.

It is clear that the lower courts have unwillingly adopted such an unjust construction only because of the (we say, mistaken) conclusion that this court's decision in Westermann Co. v. Dispatch Company, 249 U. S. 100, involving infringement of copyright in pictorial illustrations by publication is controlling in cases of infringement of musical composition copyrights by public performance.

An examination of the cases is convincing that the only reason for adopting such an unnatural and unreasonable construction has been the (we say, mistaken) assumption that the decision rendered by this court in

the case of *Westermann Co.* v. *Dispatch Co.*, 249 U. S. 100 (233 Fed. 609, in the Court of Appeals) is controlling not only in cases involving the type of infringement there under consideration, but also is controlling in cases of infringement by public performance of musical compositions. We insist that the Westermann case is not only not authority for the proposition for which it has been cited, but that if the decision is given full force in all three of its points of decision, it *cannot* be held that in case of infringement by public performance for profit of a musical composition the minimum damages are $250.00. Our point was made below, and we are encouraged to note that the Honorable District Court did not cite the Westermann case to support his decision. Our point was made in the Circuit Court of Appeals, and that court, in face of the authority *contra* has seen fit to certify the question to this court.

The recent statement of the Seventh Circuit Court of Appeals in the Dreamland Ball Room case, *supra*, (and the principal argument of plaintiffs against the Company's contentions on this point) that there are "too many judicial precedents" to permit adopting what seems undeniably the sensible construction would sound much more logical if the rule in question were a rule of property on which persons had relied, and a reversal of which would therefore cause an injustice to innocent parties; but this is a pure question of *damages*, and it is no argument for continuing the imposition of an outrageous punishment to say that such punishment has been inflicted by the District Courts in the past. The question is not settled. Only four of the ten Cir-

cuit Courts of Appeals have had it under consideration —(1) *Pastime Amusement Co.* v. *Witmark & Sons* (4th C. C. A., Dec. 1924, memorandum opinion only) 2 Fed. (2d) 1020; (2) *Berlin* v. *Daigle,* (5th C. C. A., 1929, Foster, J., Dissenting) 31 Fed. (2d) 832 and *Lutz* v. *Buck.* (5th C. C. A., 1930) 40 Fed. (2d) 501; (3) *Dreamland Ball Room* v. *Shapiro, Bernstein & Co.,* (7th C. C. A., Dec. 1929) 36 Fed. (2d) 354; and (4) the Eighth Circuit Court of Appeals in the case at bar. All of the above cited cases except one were decided after the suit at bar was brought. All rely for their ruling in the *Westermann* case; and the Eighth Circuit Court of Appeals has certified the question to this court in view of our argument that the *Westermann* case does not apply.

If the District Court was mistaken in the construction of the Westermann case, that mistaken impression should be corrected before further admitted injustice is unwittingly decreed.

3.

The Westermann case is not an authority for the proposition for which it has been cited, and does not, as has been generally supposed, require the court to assess $250 as a minimum in a case of infringement by public performance of a musical composition.

Before the decision in the Westermann case can be understood it is necessary to have a clear view of the facts of that case, for no case is law except as the opinion is applied to the facts. The defendant was a publisher of a newspaper in Columbus, Ohio. The plaintiff was the owner of the copyrights in six pictorial illus-

trations of styles of women's apparel. The defendant, without authority from plaintiff, published these illustrations as a part of paid advertisements for local dealers. Five of these six illustrations were published once. One was published twice but for different dealers. In stating the facts the court said (l. c. 103):

> "The defendant publishes at Columbus a daily newspaper, each issue comprising as many as thirty thousand copies, widely circulated."

The District Court had awarded $70.00 as *nominal* damages for the seven publications, considering each publication a separate infringement. Plaintiff appealed to the Circuit Court of Appeals for the Sixth Circuit, contending that *nominal* damages could not be awarded under Section 25 for the infringements thus proved. The Circuit Court of Appeals so held (233 Fed. 609). The "'no other case" clause was held to prevent any case of infringement from going unprovided for under Section 25, for that phrase clearly appears as a "catch-all" provision at least. Section 25 provides some measure of damage in lieu of actual damages for any type of infringement—nominal damages are therefore never properly awarded. The question in that case was to determine what measure of damages the statute provided for infringement of the type there under consideration. The Sixth Circuit Court of Appeals decided that $250.00 was the minimum damages assessable under Section 25 for each *case* where the infringement involved was the unauthorized publication of several copyrighted illustrations owned by one plaintiff, and allowed only that amount for the seven infringing pub-

lications. The court realized the harshness of applying the minimum limitation to each of the seven infringements. It said (l. c. 616):

> "While this is the first thought interpretation of the words of the law, yet we know it cannot be the real intent. The damages would have been 'irrationally increased, we believe Congress meant no such result.' "

The statute is plain that the minimum applies *to each infringement (singular) of a type coming within the "no other case" clause,* and so contending the plaintiff appealed to this court (249 U. S. 100). The opinion of this court decides three questions concerning the interpretation of the statute (and it is important that these three points of decision be well noted): (1) For each infringement coming within the "no other case" clause, the minimum damages assessable is $250.00; (2) the newspaper reproduction of a copyrighted pictorial illustration is an infringement coming within the "no other case" clause, and to publish six separately copyrighted pictorial illustrations constitutes six separate and distinct infringements, each entitling the copyright owner to the $250.00 minimum; (3) *the republication of the same copyrighted illustration by the same publisher for another dealer constitutes a separate, distinct and new infringement, entitling the copyright owner to the minimum amount of* $250.00 *for each infringement.* (This last point of decision is of controlling importance for, if infringing performances of musical compositions are a type of infringement covered by the "no other case" clause, the rule

(3) makes the statute self-contradictory, as will be pointed out hereinafter.)

This court expressly refused (l. c. 105-106) to decide the question whether a republication for the same dealer as a mere continuance of the first publication was a new and separate infringement. The number of infringements was not therefore determined by the number of suits brought or by the number of copyrights infringed, but by the number of newspaper reproductions of each copyright, and each infringement of the type there under consideration, (unlicensed publication in a newspaper; see Section 1 (b) of the statute) though of the same copyright, entitled the copyright owner to the minimum of $250.00.

To determine the applicability of the Westermann case as authority in the case at bar the character or type of the infringement under consideration by this court in the Westermann case must be analyzed. In the statement of facts in that case it appears that there were 30,000 copies of each edition in which the infringing illustrations were published. Plaintiffs in the case at bar contend that the Westermann case *decides* that the four subparagraphs are limited and controlled by the "no other case" clause of Section 25. To determine the correctness of this contention let it be assumed to be true—and then let us see the result of such assumption. What is the result when that interpretation is applied to the facts of the Westermann case itself? Under subparagraph "Second" which provides for "one dollar for every infringing copy made or

sold by or found in the possession of the infringer * * *," the plaintiff in the Westermann case (if the four subparagraphs are considered as applicable in that case) would be entitled to $30,000.00 for each infringing publication, as 30,000 copies of each illustration were made. But the opinion can be searched in vain for any mention of $30,000. If the Westermann case decided that the four subparagraphs are all controlled by the limitations in the "no other case" clause, then, as no actual damages were proved, to be consistent with this decision the court would have held not that not less than the minimum, $250.00, could be recovered for each infringement in that case but rather that no more than the maximum, or $5,000.00, could be recovered for each infringement. *The fact is (and this is apparent from the opinion) that neither the plaintiff, the defendant nor this court considered the infringements in that case as coming within the provisions of subsection second, and the court had no occasion to decide whether the four subparagraphs or any of them, were regulated or controlled by the "no other case" clause.* Everyone connected with the case, both parties and court considered the infringements to be *the newspaper reproduction of the illustrations* and not making copies, *and subsection second provides a measure of damages only where the infringement is of the latter type.*

A measure of damages for infringement of the copyright of a *photograph* by newspaper reproduction is expressly provided for: "in case of a newspaper re-

production of a copyrighted photograph such damages shall not exceed the sum of $200.00 nor be less than the sum of $50.00." Infringement by making copies of a photograph is likewise expressly provided for (subsection second). Infringement by making copies of an illustration is expressly provided for (subsection second). But Section 25 makes no *express* provision for damages in case of an infringement of the type there under consideration, to-wit: *the newspaper reproduction of an illustration.* This court, therefore, properly decided that in the case of the type of infringement under consideration in the Westermann case the "no *other* case" clause with its minimum and maximum limitations applied. The infringement in that case had to be construed as coming within the "no other case" clause if the statute was held to provide a remedy at all for such an infringement. This court was not considering a type of infringement covered by any of the four subparagraphs and it did not have occasion therefore to determine the construction of the statute with reference to the four subparagraphs. The only mention made of the four subparagraphs by this court in the Westermann case is the *obiter dictum* (the question was not before the court and not raised by counsel) that (l. c. 106):

> "* * * next, that the court may, in its discretion, allow the amounts named in the appended schedule."

That the court wished only to be considered as construing the statute as it applied to the type of infringe-

ment involved in the case then at bar, and nothing more is made apparent by the following paragraph in the opinion (l. c. 106):

> "* * * The court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement, and the like, is made the measure of damages to be paid, but with the express qualification that in every case the assessment must be within the prescribed limitations."

In thus stating the rule which the court applied in that case the opinion omits mention of the amounts named in the four subparagraphs, and the rule stated is, therefore, clearly meant to apply only to the measure of damages in cases falling within the "no other case" clause. The limitations in the "no other case" clause as applied to the case then at bar were reasonable. The court expressly indicated its intention not to consider "matters which we have no occasion to consider now" (l. c. 105). The decision necessarily means by the above stated rule that "in every case *either not expressly provided for or which is to be construed as one of the 'other' cases referred to,* the assessment must be within the prescribed limitations." We will show later on in this brief that this interpretation of the opinion is the only possible one which will render the court's decision on this point consistent with the court's decision in the same case (l. c. 105) that "the second publication of an illustration must be regarded as another and distinct case of infringement."

4.

Reference to previous Copyright Statutes and to the Congressional Committee reports is convincing that the legislature did not intend that sub-paragraph "fourth" relating to infringing performances should be limited by the "no other case" clause.

Regarding the construction of the statute, it will be profitable to review briefly the history of the damage and penalty sections, or in other words, the *remedy* sections of our copyright statutes.

The first Copyright Act (Act May 31, 1790, First Congress, Session II, Chap. XV, Sec. 2, 1 Stat. 124) provided, among other things, a penalty of fifty cents for every sheet of infringing matter found in the infringer's possession. In 1802 the act was amended (Act April 29, 1802, Seventh Congress, Sess. I, Chap. XXXVI, Sections 3 and 4, 2 Stat. 171) providing, among other things, a penalty of one dollar for every print found in the infringer's custody. In 1831 the act was again revised (Feb. 3, 1831, Twenty-first Congress, Sess. II, Chap. 16, Secs. 6, 7, 4 Stat. 437) the new Section 6 providing a penalty of fifty cents for every sheet found in the possession of the infringer in the case of a book, and Section 7 among other things providing for forfeiture of one dollar for every sheet of a map, chart, musical composition, etc. As yet the copyright protection had extended only to the right to make copies of the physical thing copyrighted. There was no such thing as performing rights. In 1856 (Act August 18, 1856, Thirty-fourth Congress, Sess. I, Chap. 169, 11 Stat. 138) Congress for the first time ex-

tended the protection of copyright to the right to publicly perform any copyrighted dramatic (not musical) composition. To usurp this right was declared an infringement. But Congress provided an entirely different type of remedy for infringement of this new right to perform. The statutes to this time all provided stipulated penalties in set amounts, one-half of which was to go to the United States. By the new act granting *performing* rights in dramatic compositions Congress declared the infringer "liable for damages," and provided that "such damages in all cases (are) to be rated and assessed at such sum, not less than one hundred dollars for the first and fifty dollars for every subsequent performance as to the court having cognizance thereof shall appear to be just." The distinction of *penalties* for "making copies" and *damages* for "performing" was preserved in the revision of the copyright laws in 1870 (Act July 8, 1870, Forty-first Congress, Sess. II, Chap. 230, Secs. 100, 101, 16 Stat. 214). Section 100 provided for a penalty of one dollar for every sheet of infringing matter found in the possession of the infringer, etc., and ten dollars for every copy of a statute, etc., "one moiety thereof to the proprietor and the other to the use of the United States." Section 101 practically reenacted the Act of 1856 as to *damages* for performance. The Act of March 3, 1891, Chap. 565, Sec. 8, amending Section 100 (26 Stat. 1109) was a substantial reenactment of that section and the distinction was still preserved. It is to be noted that until this time the minimum

($250) and maximum ($5,000) limitations which are the occasion of this appeal were not to be found in the copyright law. A minimum was found in the "performing" statute, but that statute was purely a "damage" statute and not a "penalty" statute, *and the minimum limitation there found ($100 for first and $50 for every subsequent performance) corresponds identically with the amounts found in the present subsection "Fourth" of Section* 25.

The "copies" section (Sec. 100) became Section 4965, and the "performance" section (Sec. 101) became Section 4966 of the Revised Statutes. Two cases were decided by the Supreme Court in 1899 (but arose before the 1895 revision of the statute) construing these two sections. *Brady* v. *Daly*, 175 U. S., 148, construing Section 4966 (performing rights section) was decided first. It is cited in the Westermann case and quotations at length are made from the opinion. The case involved the infringement of the copyright of a dramatic composition by infringing performances of a scene therein. It was contended that the two year penal statute of limitations applied because Section 4966 provided for penalties. The lower court held that it had jurisdiction of the case, that the evidence did not authorize an increase in damages above the minimum, but that he could not award less, and decree was entered for $50.00 for each of one hundred and twenty-six performances given in the two preceding years, or $6,300.00—recovery being limited to two years on the ground that the statute was penal (see 175 U. S. l. c.

151-152). Defendant appealed on the ground that the statute being penal, the Circuit Court had no jurisdiction. The judgment was affirmed in this court but on the ground that the statute was *not* penal and the minimum recovery for each infringement did not make it so. The court stated that recovery could have been had for more than the two years allowed had appeal been taken by the plaintiff (l. c. 161). Where the infringement, then, was by public performance, Congress sought by Section 4966 to give *damages*, but not to punish the offender.

Then the case of *Belles* v. *Outing Co.*, 175 U. S. 262, construing Section 4965 ("copies" section) was decided. Many infringing copies of a copyrighted photograph had been sold by the defendant, but only one copy was found in his possession. The court held that only one dollar could be recovered on the ground that as Section 4965 ("copies" section) was penal, it should be strictly construed. Where the infringement, then, was by making copies, Congress sought by Section 4965 to give a *penalty*.

In 1895 (Act March 2, 1895, Fifty-third Congress, Sess. III, Chap. 194, 28 Stat. 965) Section 4965 ("copies" section) was amended by adding the following proviso:

> "Provided, however, that in case of any such infringement of the copyright of a photograph made from any object not a work of fine arts, the sum to be recovered in any action brought under the provisions of this section shall be *not less than one hundred dollars, nor more than five thousand dollars*, and: Provided, further, that in case of

any such infringement of the copyright of a painting, drawing, statue, engraving, etching, print, or model or design for a work of the fine arts or of a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall be not less than *two hundred and fifty dollars, and not more than ten thousand dollars.* One-half of all the foregoing penalties shall go to the proprietor of the copyright and the other half to the use of the United States" (italics ours).

The Committee on Patents, in recommending the latter bill for passage, said:

> "This amendment makes no substantial change in the existing law, except to moderate the rigor of the penalties established." (H. R. No. 1733 3rd session, 53rd Congress, 1894-95 Vol. 1.)

For the first time (in 1895), we find the maximum and minimum limitations now under consideration. Section 4965, the penalty statute, the "copies" section, was amended by incorporating the maximum and minimum limitations "to moderate the rigor of the penalties established." Section 4966, the damage statute, the "performing" section, was not amended by Congress. Penalties should be limited, but there is no reason for limiting recovery under a *compensatory* statute. It was held in *Boston Traveler Co.* v. *Purdy*, 137 Fed. 717, that the penal character of Section 4965 was not changed by the amendment. The distinction, then, between infringement by copying and infringement by performing on the question of remedy was still preserved by Congress.

By Act January 6, 1897, Chap. IV, 29 Stat. 481, Section 4966 was amended to include for the first time performances of musical compositions in the list of infringements by performance, with the same remedy as that given for infringing performances of a dramatic composition.

Thus stood the law at the time the matter of revision of the copyright laws was referred to the Patent Committee in 1908. The bill to "amend and consolidate the Acts respecting copyright" was prepared and presented. It is clear that the purpose of Section 25 of the New Act was to incorporate into one section old Sections 4965 and 4966, and to remove the penal character of Section 4965 by granting greater discretion to the courts and by eliminating the provision that one-half of the recovery was to go to the United States. It need hardly be said the wording and arrangement of the new statute is obscure. We have shown that the courts have expressly recognized this fact. To help clarify this ambiguity or obscurity the court may resort to the committee reports and prior statutes.

> "Reports of committees of House or Senate * * * may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure" (*Duplex Co.* v. *Deering*, 254 U. S. 443, l. c. 474).

In *Northern Commercial Co.* v. *U. S.*, (9th C. C. A. 1914) 217 Fed. 33, it is said, l. c. 35-36:

> "As a premise, certain well established principles of construction may be recounted. The court may with propriety, where the language of

the statute appears to be ambiguous or the meaning doubtful, put itself so far as possible in the light that the law makers enjoyed, and view the situation as it appeared to them, and thereby ascertain and discover the purpose and intendment of the enactment from the language employed, in connection with the attending conditions and circumstances, including the history of the times. *United States* v. *Union Pacific Railroad Co.*, 91 U. S. 72, 79, 23 L. Ed. 224; *Platt* v. *Union Pacific Railroad Co.*, 99 U. S. 48, 64, 25 L. Ed. 424; *Smith* v. *Townsend*, 148 U. S. 490, 494, 13 Sup. Ct. 434, 37 L. Ed. 533.

"Statutes relating to the same subject-matter must be construed *in pari materia*. This may include earlier acts and such as have expired or been repealed as well. * * *

"Effect, if possible, must be given to every word and phrase of the statute, so as to render it a harmonious whole; and the words 'or' and 'and' are sometimes convertible, as the sense may require."

In *Forlini* v. *U. S.*, 12 Fed. (2d) 631 (2d C. C. A. 1926) it is said (l. c. 633):

"Reference may be had, in the construction of this statute, to prior acts, in order to solve any ambiguity which may exist."

In *Stockyards Loan Company* v. *Nichols*, (8 C. C. A. 1917) 243 Fed. 511, it was said (l. c. 516):

"In order to ascertain the intention of the legislature * * * the court may look to each part of the statute, to other statutes upon the same or related subjects, the old law upon the subject, to the evils and mischiefs to be remedied, and to the natural or absurd consequences of any particular interpretation."

We must therefore consider the present statute in light of the rules and guides to construction above set out. That Congress did not, by consolidating Sections 4965 and 4966 into Section 25 of the 1909 Act, intend to make the old maximum and minimum limitations which had been previously applied only to penalties assessed under Section 4965, the "copies" section, applicable to infringement by public performance, clearly appears from the committee report (Report 2222, 60th Congress, 2nd Session, Vol. 1, H. R., pp. 15-16). Quoting from the committee report:

> "The provision that in lieu of actual damages and profit, such damages shall be awarded as shall appear to the court just, not exceeding the sum of $5,000.00 is a modification of existing law *decreasing instead of increasing the amount* which may be obtained in this way. * * * The special limitation as to the amount of damages which may be recovered in case of a newspaper reproduction of a copyrighted photograph is made because such reproduction has little permanent value or usefulness and a reproduction in this form does not damage the copyright proprietor to as great an extent as would the reproduction and sale of copies of the photograph in a different form" (italics ours). Report 2222, 60th Congress, 2nd Session, Vol. 1, H. R., pp. 15-16.

It can be seen from this statement of the committee that the "modification of existing law" intended was the reduction of the maximum limitation in old Section 4965 ("copies" section) fom $10,000 to $5,000. There is no language evidencing an intention to subject to the maximum and minimum limitations in

paragraph (b) of Section 25 (formerly found only in Sec. 4965) the amounts recoverable for infringing public performances under old Section 4966 ("performing" section). That such was not the intention also appears from the committee's comment on the fourth sub-paragraph:

> "*The fourth is a substantial re-enactment of existing law,* which provides that the damages for an infringement of any dramatic or musical composition shall be not less than $100.00 for the first performance and $50.00 for each subsequent performance, *but we have modified this provision in the bill by fixing the damages for an infringing performance of a purely musical composition at* $10.00" (italics ours).

There is no suggestion in the whole report of the intent to subject the provisions of old Section 4966 to the arbitrary limits of old Section 4965. The remedy providing for infringing *performances* was apparently entirely satisfactory, except in the case of infringing performances of musical compositions. As to such infringements the committee felt the old minimum too high and *reduced it to* $10.00 *for each infringing performance.*

It is not necessary to decide in this case whether sub-paragraphs first and second of the present Section 25 are within the limitations of the "no other case" clause. They state a measure of damages for infringing "copies," and might be so construed. The form of the statute should not be used as an excuse to defeat the clear intention of the legislature. It is clear that Congress never intended to include sub-paragraphs third and fourth (providing a measure

of damages for infringing performances) within the limitations of the "no other case" clause. Such infringements were not intended to be considered as "other" cases. This court itself suggested in the Westermann case that there was a distinction between the first two and the latter two sub-paragraphs (249 U. S., l. c. 106):

> "What bearing the third and fourth subdivisions of Section 25 before quoted, would have on the solution of that question, are matters which we have no occasion to consider now."

By way of summarizing the history of the Copyright Statutes, we note:

1. That Congress has always distinguished in the matter of remedy between infringing by performing and infringing by copying.

2. That the limitations found in the "no other case" clause have never been applied to infringing performances.

3. That Congress did not intend to change the law in this respect by the enactment of Section 25.

5.

The Westermann case cannot be applied to infringement of a musical composition copyright by public performance because if so applied the statute becomes inconsistent with itself.

We now refer to the second and third points of decision in the Westermann case mentioned *supra*, page 16. Each copyrighted illustration infringed by newspaper reproduction entitles the owner thereof to

the minimum limitation in the "no other case" clause, to-wit, $250.00. Also each newspaper reproduction of the *same copyrighted illustration* is a distinct infringement and the minimum limitation applies to *each publication.* That each public *performance* of a dramatic composition is a distinct infringement is settled by the decision in *Brady* v. *Daly, supra,* holding that for 126 performances of the same dramatic composition $6,300.00 was the minimum recovery under old Section 4966. The decision in the Westermann case, as to infringements by newspaper reproduction, cannot possibly be applied to infringements covered by the third and fourth sub-paragraphs (infringements by performance), if effect is to be given to the entire statute, for *if the third point of decision is thus applied, each performance of the same copyrighted musical composition, being a separate and distinct infringement, would require that the minimum of* $250.00 *be assessed.* If the Westermann Case is applicable to infringing performances, all three points of decision apply to such infringements; with the result that if the same selection is played 25 times on as many nights in defendant's hotel, defendant is not liable for $250.00 ($10.00 for each performance) but rather for $6,250.00 ($250 for each performance) since each performance of the same copyrighted selection under the Westermann and Brady cases is a separate infringement, and the limitations in the "no other case" clause are applicable to each *infringement* of the same copyright, and not to each *case* of several infringements!

If the Westermann case decision is applicable to infringements by *performance*, the only possible time that the fourth sub-paragraph of Section 25 could apply would be when some proprietor of a public place locked his customers in and had the same orchestra play the same copyrighted selection to the same people on the same night more than twenty-five times. In which event the cause of action for infringement would probably not survive the death of the infringers. And even supposing such an impossible case, this court in the Westermann case (if the decision is applicable to infringing performances) expressly leaves the question open whether each of *these* renditions would not be a separate infringement subject to the minimum limitation of $250.00 in the "no other case" clause! If the Westermann case is held to have construed the statute as to sub-paragraph "fourth" the statute in effect necessarily is to be read as follows:

> "The court may, in its discretion, allow the amounts as hereinafter stated * * * fourth * * * in the case of musical compositions, ten dollars for each infringing performance, * * * but in no case of an infringing performance of a musical composition shall such damages exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars."

That this is the result of the holding of the District Court is made clear by the fact that no court has ever, under the construction of the statute for which plaintiffs contend, found occasion to apply the provisions of sub-paragraph four to any case, though the books are full of cases of infringing performances of copyrighted compositions.

Conclusions.

We respectfully submit that this court should correct the general misapprehension as to the meaning of the decision in the Westermann case. The lower courts have frequently expressed the desire to decide in favor of the construction for which we now contend, and would, we feel, undoubtedly have so decided had the import of the Westermann case decision and the history of the statute been completely presented. The stipulated amounts in Section 25 are intended to take the place of actual damages; they are not penalties for criminal acts but damages for an innocent trespass. If the infringement is willful, the statute expressly provides that the limitations are not applicable. If more damage is suffered it may be shown—the copyrighter is not limited to the amounts named, as they apply only when actual damage is not shown.

The argument made that Congress intended to compensate a copyright owner for bringing suit, etc., will not bear analysis. Suit must be brought to recover any civil damages; plaintiff must engage counsel, but defendant is made liable for the attorneys' fees (Sec. 40); if depositions have to be taken they are at the cost of defendant if defendant loses the case; and as to "going to a distant place for trial," such action is not necessary. Trial is usually had in the district where the infringement takes place and where the witnesses are located. *The* $10.00 *recovered is over and above all legitimate expense and cost of trial.* If a defendant knows that an unauthorized performance will

cost him $10.00 plus attorneys' fees for both sides of the case plus all costs of litigation, he is not likely to deliberately infringe, and if the infringement is innocent, he should not be penalized therefor. It is clear that absent expense of litigation, $10.00 is more than ample recompense for the hypothetical injury resulting from the general type of unpermitted performance, and an innocent infringer being shown that he has infringed would pay that amount to avoid litigation and the incidental expense thereof.

We respectfully submit that question II should be answered in the negative, and that question III should be answered in the affirmative. In view of the statement of facts it appears to us that question IV is not decisive, but from the argument above it would seem to follow that the limitations do not apply to any infringement after actual notice and the question should therefore be answered in the negative.

Respectfully submitted,

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